NO. 42849-1-II

COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

ROBERT T. DRISCOLL,

Appellant.

APPEAL FROM THE SUPERIOR COURT
FOR THURSTON COURT
The Honorable Gary R. Tabor, Judge
Cause No. 11-1-00703-4

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

01. The trial court erred in not taking count I, unlawful possession of a firearm in the first degree, from the jury for lack of sufficient evidence.

02. The trial court erred in not taking count II, unlawful possession of methamphetamine with intent to deliver, from the jury for lack of sufficient evidence.

03. The trial court erred in permitting Driscoll to be represented by counsel who allowed the State to put into evidence his prior judgment and sentence instead of offering to stipulate that he had a previous unnamed conviction for a serious offense.

04. The trial court erred in permitting Driscoll to be represented by counsel who provided ineffective assistance by failing to object to testimony and evidence regarding his prior convictions.

05. The trial court erred in permitting Driscoll to be represented by counsel who provided ineffective assistance by failing to object to or by assenting to the court's instruction 6 that the jury could consider all of Driscoll's prior convictions in deciding what weight or credibility to give his testimony.

06. The trial court erred in permitting Driscoll to be represented by counsel who provided ineffective assistance by failing to object to hearsay testimony that violated the confrontation clause under the Sixth Amendment and article I, section 22 of the Washington Constitution.

07. The trial court erred by violating Driscoll's and the public's constitutional right to an open and public trial when it conducted an in-chambers

conference to discuss evidence admitted at trial and jury instructions.

08. The trial court erred in finding that Driscoll had the current or future ability to pay legal financial obligations (LFOs).

09. The trial court erred in failing to dismiss Driscoll's convictions where the cumulative effect of the claimed errors materially affected the outcome of the trial.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

01. Whether there was sufficient evidence to uphold Driscoll's convictions for unlawful possession of a firearm in the first degree and unlawful possession of methamphetamine with intent to deliver where the State failed to prove that he possessed either item? [Assignment of Error Nos. 1-2].

02. Whether Driscoll was prejudiced by his counsel allowing the State to put into evidence his prior judgment and sentence instead of offering to stipulate that he had a previous unnamed conviction for a serious offense? [Assignment of Error No. 3].

03. Whether the trial court erred in permitting Driscoll to be represented by counsel who provided ineffective assistance by failing to object to testimony and evidence regarding his prior convictions? [Assignment of Error No. 4].

04. Whether the trial court erred in permitting Driscoll to be represented by counsel who provided ineffective assistance by failing to object to or by assenting to the court's instruction 6 that the jury could consider all of Driscoll's prior convictions in

deciding what weight or credibility to give his testimony? [Assignment of Error No. 5].

05. Whether the trial court erred in permitting Driscoll to be represented by counsel who provided ineffective assistance by failing to object to hearsay testimony that violated the confrontation clause under the Sixth Amendment and article I, section 22 of the Washington Constitution? [Assignment of Error No. 6].

06. Whether the in-chambers discussion between counsel and the trial court concerning evidence admitted at trial and jury instructions violated Driscoll's and the public's right to an open and public trial under the state and federal constitutions? [Assignment of Error No. 7].

07. Whether the trial court, sans an inquiry into Driscoll's individual financial circumstances, erred in finding that he had the current or future ability to pay legal financial obligations? [Assignment of Error No. 8].

08. Whether the cumulative effect of the claimed errors materially affected the outcome of the trial requiring reversal of Driscoll's convictions? [Assignment of Error No. 9].

C. STATEMENT OF THE CASE

01. Procedural Facts

Robert T. Driscoll (Driscoll) was charged by information filed in Thurston County Superior Court on May 10, 2011, with unlawful possession of a firearm in the first degree, count I, and

unlawful possession of methamphetamine with intent to deliver, count II, contrary to RCWs 9.41.040(1)(a) and 69.50.401(2)(a).[1] [CP 2].

No motions were filed nor heard regarding either a CrR 3.5 or CrR 3.6 hearing. [CP 6]. Trial to a jury commenced on November 16, the Honorable Gary R. Tabor presiding. The jury returned verdicts of guilty as charged, Driscoll was sentenced within his standard range and timely notice of this appeal followed. [CP 31-32, 39-49].

02. Substantive Facts

On February 7, 2011, Community Corrections Officer Matt Frank observed a car pull into the parking lot at the Department of Corrections office in Olympia and "noticed Mr. Driscoll get out of the driver's side and a female get out of the passenger's side of the vehicle." [RP 57].[2] Driscoll, who was on community supervision, had come to the office to see Dan Cochran, his Community Corrections Officer. [RP 14, 181].

Driscoll and his girlfriend, later identified as Danielle Neill,[3] went into the building and waited in the lobby for Cochran to arrive. [RP 24,

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[1] The information, though correctly listing the elements for this offense, incorrectly cites to RCW 69.50.401(1)(a), rather than RCW 69.50.401(1)(b). See State v. Leach, 113 Wn.2d 679, 696, 782 P.2d 552 (1989).

[2] All references to the Report of Proceedings are to the transcripts entitled Jury trial, Volumes I-II.

[3] Neill testified that her maiden name was Neill and her married name Frost. She is referred to herein as Neill [RP 83, 165].

51, 83]. At one point, according to Frank, Driscoll and Frost returned to the vehicle:

> He got in the driver's side. She got in the passenger's side. They were out there for a little bit I believe smoking a cigarette, and then came back into the office....

[RP 59].

Driscoll was arrested shortly thereafter for violations of his community custody conditions. [RP 22, 24-25]. Neill, who was still in the lobby and had the keys to the car [RP 52], "unlocked (the vehicle) remotely" before it was searched by Cochran and several other officers. [RP 25, 28, 51]. The vehicle was a white Honda with distinctive Lamborghini-type doors that Cochran had seen Driscoll in on "many occasions." [RP 27, 182]. Though Cochran didn't recall when Driscoll had obtained the vehicle, he remembered "he brought me the registration and told me that he had bought the car. [RP 50].

> (H)e brought it to me when he first received it. He gave me a copy of the registration. I went out to - - took photographs of the vehicle itself. On many occasions we drove by his home and we would be looking for that vehicle because of the fact that if it was there, he would be there....

[RP 27].

A black bag was located under the hood wedged between the engine and the frame [RP 69] that contained a loaded "semiautomatic slide pistol," three baggies of what the parties stipulated was 14.5 grams of methamphetamine, two glass smoking pipes, an "electronic digital scale" and numerous small empty baggies. [RP 31, 34-39, 80-82, 116-17]. The parties further stipulated that the firearm was operational. [RP 102]. Driscoll's left thumbprint was found on the scale [RP 113-14] and $323 was found in his wallet. [RP 44]. A computer check of the vehicle that afternoon with the Department of Licensing came back showing Driscoll as the registered owner. [RP 68-69]. The estimated street value of the methamphetamine was $2,320. [RP 94].

At the scene, Driscoll denied any knowledge of the items found underneath the hood of the car and claimed that he had earned the money found in his wallet. [RP 43-45, 53, 85-87]. After being transferred to the Nisqually tribal jail, Driscoll was overheard on a phone call telling a person "that his alibi was going to be that he was dropped off at the office by someone else and that he was not in the vehicle." [RP 61].

Corey Ballard testified that he had sold the pistol found under the car hood to Neill sometime between August and December 2010, at which time Neill said she was buying it for Driscoll. [RP 127, 131-33]. Neill denied making this comment. [RP 154].

On the morning of the incident, Neill met with Juanita Peabody to show her the white Honda, which she said was her new car. [RP 136]. After receiving a call from Driscoll, she had to leave to give him a ride "to probation or something." [RP 137]. Peabody wouldn't let Neill leave a bag with her that contained the pistol Neill had purchased from Ballard and drugs, suggesting instead that Neill put the bag underneath the hood where it was eventually found. [RP 140, 142-44, 159, 163, 174].

Neill testified that Driscoll had given her the Honda as a gift on February 1. [RP 148]. After initially asserting she had sold the Honda [RP 148], she admitted that shortly after Driscoll had been taken into custody a person named Jeremy Garretson, who had previously left the seized drugs in the Honda by accident, "took the car, you know, because the drugs got taken, and I'm scared to tell." [RP 176]. She further explained that she had traded the Honda with Garretson for a Monte Carlo and that "(h)e came back and took my Monte Carlo." [RP 180].

At trial, Driscoll said that Neill had been the driver on February 7, and that he knew he was going to be taken into custody because he had missed a UA. [RP 184-86]. When initially confronted with the bag found underneath the hood, Driscoll thought the DOC officers had put it under the hood of the car. [RP 187].

> I told them they put it in there. I don't know what was wrong. I've gotten enough convictions for getting myself in trouble before, and I mean, I'm staying away from all that. I just thought they were trying to set me up.

[RP 187].

> I thought they were joking at first until I seen the police officers come in. Then I got spooked.

[RP 193].

Driscoll claimed he earned the $323 building a deck but didn't want to say for whom because "I'm already a convicted felon, it's hard enough to get a job, and I don't need no CCOs calling people up and asking does this guy work for you when I'm working under the table." [RP 189]. On the morning of the incident, when he went out to the Honda to get his cigarettes while Neill was in the shower, he saw the scale, which looked like a cell phone, and momentarily picked it up before grabbing his cigarettes and returning to his house. [RP 189]. He denied driving the Honda on the day of the incident but admitted to originally trying to create some type of alibi on the overheard phone call, but in the end decided to tell the truth. [RP 201, 206].

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D. ARGUMENT

01. THERE WAS INSUFFICIENT EVIDENCE TO UPHOLD DRISCOLL'S CONVICTIONS FOR UNLAWFUL POSSESSION OF A FIREARM IN THE FIRST DEGREE AND POSSESSION OF METHAMPHETAMINE WITH INTENT TO DELIVER WHERE THE STATE FAILED TO PROVE THAT HE POSSESSED EITHER ITEM.[4]

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. Salinas, at 201; State v. Craven, 67 Wn. App. 921, 928, 841 P.2d 774 (1992). Circumstantial evidence is no less reliable than direct evidence, and criminal intent may be inferred from conduct where "plainly indicated as a matter of logical probability." State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. Salinas, at 201; Craven, at 928.

[4] As the argument is the same for each offense, the offenses are addressed collectively herein for the purpose of avoiding needless duplication.

A person having previously been convicted of any serious offense, as is the case with Driscoll, is guilty of first degree unlawful possession of a firearm if that person has in his or her possession or control a firearm. RCW 9.41.040(1)(a). This is not a strict liability offense, however, and requires knowing possession of the firearm. State v. Cuble, 109 Wn. App. 362, 366-69, 35 P.3d 404 (2001). Similarly, in part, a person is guilty of unlawful possession of methamphetamine with intent to deliver if he or she possesses the substance. RCW 69.50.401(2)(b).

Possession may be actual or constructive. State v. Escheverria, 85 Wn. App. 777, 783, 934 P.2d 1214 (1997). "Actual possession occurs when the goods are in the personal custody of the person charged with possession; whereas, constructive possession means that the goods are not in actual, physical possession, but that the person charged with possession has dominion and control over the goods." State v. Callahan, 77 Wn.2d 27, 29, 459 P.2d 400 (1969). Constructive possession may not be conclusively established solely upon evidence of dominion and control over the premises, State v. Cantabrana, 83 Wn. App. 204, 207-208, 921 P.2d 572 (1996), since it is not a crime to have dominion and control over the premises where a controlled substance is found. State v. Olivarez, 63 Wn. App. 484, 486, 820 P.2d 66 (1991). An automobile may be considered a "premise" for the purpose of determining whether a defendant exercised dominion and

control over the premises where drugs were found. State v. Mathews, 4 Wn. App. 653, 656, 484 P.2d 942 (1971) (citing State v. Potts, 1 Wn. App. 614, 464 P.2d 742 (1969)). Exclusive dominion and control over the goods is not necessary, but mere proximity to the contraband is insufficient. State v. Jones, 146 Wn.2d 328, 333, 45 P.3d 1062 (2002). No single factor is dispositive in making this determination. The totality of the circumstances must be considered. State v. Collins, 76 Wn. App. 496, 501, 886 P.2d 243, review denied, 126 Wn.2d 1016 (1995).

The circumstances here do not evince sufficient proof that Driscoll possessed either the firearm or the methamphetamine. Given that the items were not found on him, it is undisputed that he did not have actual custody. To establish constructive possession, the State had to show that Driscoll had dominion and control over the items, which means that the items could "be reduced to actual possession immediately." State v. Jones, 146 Wn.2d at 333. Here, the items were not in plain view and could not have been easily reached. There was insufficient proof from which to reasonably infer that Driscoll even knew the items had been secreted under the hood in the engine compartment, even more so given the evidence that Neill was the one who had put the bag containing the firearm and drugs underneath the hood where it was eventually found. At most, the State proved that Driscoll was close to the items found under the hood of the

vehicle. But this proves proximity only and is insufficient to prove constructive possession. State v. Raleigh, 157 Wn. App. 728, 737, 238 P.3d 1211 (2011).

Driscoll's convictions must be reversed and the case remanded to the trial court to dismiss with prejudice.

02. DRISCOLL WAS PREJUDICED BY HIS COUNSEL ALLOWING THE STATE TO PUT INTO EVIDENCE HIS PRIOR JUDGMENT AND SENTENCE INSTEAD OF OFFERING TO STIPULATE THAT HE HAD A PREVIOUS UNNAMED CONVICTION FOR A SERIOUS OFFENSE.

Every criminal defendant is guaranteed the right to the effective assistance of counsel under the Sixth Amendment of the United States Constitution and Article I, Section 22 of the Washington State Constitution. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). A criminal defendant claiming ineffective assistance must prove (1) that the attorney's performance was deficient, i.e., that the representation fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that prejudice resulted from the deficient performance, i.e., that there is a reasonable probability that, but for the attorney's unprofessional errors,

the results of the proceedings would have been different. State v. Early, 70 Wn. App. 452, 460, 853 P.2d 964 (1993), review denied, 123 Wn.2d 1004 (1994); State v. Graham, 78 Wn. App. 44, 56, 896 P.2d 704 (1995). Competency of counsel is determined based on the entire record below. State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972) (citing State v. Gilmore, 76 Wn.2d 293, 456 P.2d 344 (1969)). A reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on one prong. State v. Tarica, 59 Wn. App. 368, 374, 798 P.2d 296 (1990).

Additionally, while the invited error doctrine precludes review of error caused by the defendant, See State v. Henderson, 114 Wn.2d 867, 870, 792 P.2d 514 (1990), the same doctrine does not act as a bar to review a claim of ineffective assistance of counsel. State v. Doogan, 82 Wn. App. 185, 917 P.2d 155 (1996) (citing State v. Gentry, 125 Wn.2d 570, 646, 888 P.2d 1105 (1995)).

To prove the charge of unlawful possession of a firearm in the first degree under RCW 9.41.040(1)(a), as charged in this case, the State had to establish that Driscoll previously had been convicted of a serious offense, which includes any felony violation of RCW 69.50 that is classified as a class B felony or has a maximum term of confinement of a least 10 years.

RCW 9.41.010(16)(b). Driscoll had a prior conviction for a serious offense. [CP 35-36].

At trial, without objection, the State put into evidence a judgment and sentence showing Driscoll's prior convictions for "two counts of unlawful delivery, distribution of a controlled substance-methamphetamine to a person under the age of 18." [RP 46-47; State's Exhibit 11]. The judgment and sentence also revealed that Driscoll had one additional prior drug conviction for possession of methamphetamine in 1998 and three prior theft second degree convictions from 10/16/91 to 11/03/92, one of which was a juvenile adjudication. [State's Exhibit 11].

During the cross-examination of Driscoll, after handing him State's Exhibit 11, the above-noted prior judgment and sentence, the prosecutor returned to his emphasis on Driscoll's prior convictions:

> Q. In October - - on October 30th of 2000, which was over eleven years ago almost, what was the drug that you were convicted of delivering to a person under the age of 18?
>
> A. Methamphetamine and marijuana.

[RP 197].

The prosecutor went on to ask Driscoll the length of his sentence for these offenses, to which Driscoll responded, " I got 78 months, and I haven't had any drug convictions since." [RP 199]. "How many felony

convictions do you have, Mr. Driscoll?" Driscoll told him it was four of five:

> I have three theft seconds when I was a juvenile in Alabama because I stole my dad's grill and his camera. I have a simple possession in 1998, I have the delivery in 2001, and I have a possession of firearm in 2008. That sums it up, don't it?

[RP 199-200].

The prosecutor then brought out the fact that even though Driscoll had gone to trial, he was "convicted of two counts of delivery." [RP 200]. "So even though you said 'I possessed it,' the jury still found you guilty." [RP 200]. "And your sentence, as you just described was 78 months?" [RP 200]. The emphasis continued:

> Q. ... Mr. Driscoll, you're familiar with the drug laws based on your own convictions here, possession delivery, things of that nature, correct?
>
> A. Yes, sir.
>
> Q. Okay. And you have had a drug problem throughout your adult life as it shows from these documents and what you've told us, correct?
>
> A. Off and on, yes.

[RP 201].

In addition, the prior offense was listed as element (2) in the court's to-convict instruction for the crime of unlawful possession of a firearm in the first degree: "That the defendant had previously been

convicted of Unlawful Delivery/Distribution of a Controlled Substance to a person under the Age of Eighteen, a serious offense...." [CP 24; Court's Instruction 8].

There can be no argument but that a stipulation that Driscoll had a prior conviction for a serious offense, along with an appropriate jury instruction, would have proved conclusively this element of the charged offense of unlawful possession of a firearm in the first degree. This is not an abstract speculation. The probative value of naming the conviction, if any, as compared to a properly worded stipulation is trifling, while the unfair prejudice is significant. By failing to stipulate, counsel allowed the jury to hear that Driscoll had been convicted of three prior drug convictions for methamphetamine, two for delivery and one for possession, and that the former involved a person under the age of 18. These offenses are similar to the drug charge in count II for which Driscoll was on trial. When, as here, an element of the charged crime includes a prior conviction that is prejudicial to the defense, trial courts must accept a defense offer to stipulate to the prior conviction's existence rather than admit details of the conviction at trial. Old Chief v. United States, 519 U.S. 172, 117 S. Ct. 644, 665, 136 L. Ed. 2d 474 (1997); State v. Johnson, 90 Wn. App. 54, 60-61, 950 P.2d 981 (1998).

The record does not, and could not, reveal any tactical or strategic reason why trial counsel allowed the State to put into evidence Driscoll's prior judgment and sentence, which, as previously illustrated set forth six prior felony offenses, instead of offering to stipulate that he had a previous unnamed conviction for a serious offense, especially since the following instruction given by the court did not limit the scope of the use of Driscoll's prior convictions for the sole purpose of establishing the prior offense requirement of unlawful possession of a firearm.

> You may consider evidence that the defendant has been convicted of a crime only in deciding what weight or credibility to give to the defendant's testimony, or for determining if a prerequisite element of a charged crime has been proved, and for no other reason.

[CP 23-24; Court's Instruction 6].

The prejudice is self-evident, and even more so absent a limiting instruction prohibiting the jurors from considering the evidence of Driscoll's prior drug convictions in deciding what weight or credibility to give his testimony. There is a reasonable probability that the outcome of the trial would have differed had defense counsel successfully requested a stipulation that Driscoll had a prior qualifying conviction.

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03. DRISCOLL WAS PREJUDICED AS A RESULT OF HIS COUNSEL'S FAILURE TO OBJECT TO TESTIMONY AND EVIDENCE REGARDING HIS PRIOR CONVICTIONS.[5]

As previously set forth, without objection the State introduced evidence of Driscoll's three prior second degree theft convictions from 10/16/91 to 11/03/92, cross-examined Driscoll regarding his prior unlawful possession of a firearm conviction and three prior drug convictions for methamphetamine, two for delivery and one for possession. [RP 197-201]. Driscoll was sentenced on the possession of methamphetamine conviction on March 26, 1998. The State also elicited testimony without objection from Driscoll about his prior record and from his Community Corrections Officer (CCO) that Driscoll had prior convictions for "two counts of unlawful delivery, distribution of a controlled substance-methamphetamine to a person under the age of 18." [RP 46-47]. The CCO's testimony and the prosecutor's questions and Driscoll's responses regarding these convictions were not relevant to any issue at trial and were highly prejudicial under ER 403.

Evidence of a prior a conviction for a crime of dishonesty is generally inadmissible to impeach a witness' credibility if more than 10

[5] For the sole purpose of avoiding needless duplication, the prior discussion relating to the test for ineffective assistance of counsel is hereby incorporated by reference for this and the remaining arguments relating to ineffective assistance of counsel.

years has elapsed since the date of conviction or the date of release from confinement of the witness, whichever is later. ER 609(b). A prior conviction that does not involve dishonesty is presumed inadmissible. State v. Calegar, 133 Wn.2d 718, 947 P.2d 235 (1997). To overcome this presumption, the burden is on the party seeking admission of the prior conviction to show that the probative value exceeds the prejudicial effect to the defendant. State v. Jones, 101 Wn.2d 113, 677 P.2d 131 (1984). There is "nothing inherent in ordinary drug convictions to suggest the person convicted is untruthful and ... prior drug convictions, in general, are not probative of a witness's veracity under ER 609(a)(1)." State v. Hardy, 133 Wn.2d at 709-10. Evidence of drug use can be prejudicial. State v. Crane, 116 Wn.2d 315, 333, 804 P.2d 10, cert. denied, 501 U.S. 1237 (1991).

This case turned on whether the jury believed either Driscoll's testimony or testimony presented on behalf of the State. Without the evidence of the prior convictions addressed herein—three theft convictions beyond the 10-year limitation of ER 609(b) and four convictions that were not crimes of dishonesty—and the attendant Court's Instruction No. 6 (see following argument) that the jury could consider these convictions in weighing Driscoll's credibility, the jury reasonably could have found him not guilty. The introduction of this evidence was

improper and prejudicial, and counsel's failure to object to its admission affected the jury verdicts and constitutes ineffective assistance of counsel, satisfying both elements of the test. There is no tactical or strategic reason to explain why counsel did not object. The error was not harmless, with the result that Driscoll's convictions must be reversed.

04. DRISCOLL WAS PREJUDICED AS A RESULT OF HIS COUNSEL'S FAILURE TO OBJECT TO OR BY ASSENTING TO THE COURT'S INSTRUCTION 6 THAT THE JURY COULD CONSIDER ALL OF HIS PRIOR CONVICTIONS IN DECIDING WHAT WEIGHT OR CREDIBILITY TO GIVE TO HIS TESTIMONY.

As a corollary to the preceding argument, an accused is entitled to a limiting instruction to minimize the damaging effect of admitted evidence by explaining the limited purpose for the admission of the evidence to the jury. State v. Donald, 68 Wn. App. 543, 547, 844 P.2d 447, rev. denied, 121 Wn.2d 1024 (1993). Drug evidence, as previously indicted, is not probative of truthfulness because it has little to do with a witness's credibility. State v. Stockton, 91 Wn. App. 35, 42, 955 P.2d 805 (1998). The following instruction given by the court, however, permitted the jury to consider Driscoll's prior drug convictions for this very purpose:

> You may consider evidence that the defendant has been convicted of a crime only in deciding what weight or credibility to give to the defendant's testimony, or for

> determining if a prerequisite element of a charged crime has been proved, and for no other reason.

[CP 23-24; Court's Instruction 6].

A version of this instruction, based on WPIC 5.05, was proposed by the State:

> You may consider evidence that the defendant has been convicted of a crime only in deciding what weight or credibility to give to the defendant's testimony, and for no other reason.

[CP 59; Plaintiff's Proposed Instruction 6].

Driscoll did not propose any written instructions and there is no tactical or strategic reason why he failed to object to the Court's Instruction 6, even more so given that his credibility was crucial to his defense. And the prejudice is self-evident. As explained in the preceding section, this case turned on whether the jury believed Driscoll's version of the events. And it is on this point that this instruction undermined Driscoll's credibility, with the result that the error cannot be deemed harmless.

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05. DRISCOLL WAS PREJUDICED AS A RESULT OF HIS COUNSEL'S FAILURE TO OBJECT TO HEARSAY TESTIMONY THAT VIOLATED THE CONFRONTATION CLAUSE UNDER THE SIXTH AMENDMENT AND ARTICLE I, SECTION 22 OF THE WASHINGTON CONSTITUTION.

Without objection, Dan Cochran, Driscoll's CCO, testified to his reason for arresting Driscoll:

> I had received a phone call from an employee here at - - the Thurston County Jail, and they had informed me that they were listening to their phone calls. Most of the phone calls are recorded that are going out of the jail. And they had overheard a conversation with Mr. Driscoll who was on the outside talking to an offender who was locked up at the time, and they let me know that they had heard a conversation where they were referring to Mr. Driscoll several times was participating in drug activity.

[RP 20-21].

Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." ER 801(c). Hearsay is inadmissible unless it falls within certain exceptions, none of which apply in this case. ER 802.

The Sixth Amendment provides that a person accused of a crime has the right "to be confronted with witnesses against him." Similarly, article I, section 22 of the Washington State Constitution asserts that "[i]n

criminal prosecutions the accused shall have the right to ... meet the witnesses against him face to face." Const. art. I, § 22 (amend. 10). In State v. Pugh, 167 Wn.2d 825, 835, 225 P.3d 892 (citing State v. Foster, 135 Wn.2d 441, 957 P.2d 712 (1998)), our Supreme Court concluded that article I, section 22 is more protective than the Sixth Amendment with regard to a defendant's right of confrontation.

In Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), the United States Supreme Court held that out-of-court testimonial statements by witnesses are inadmissible under the Sixth Amendment's Confrontation Clause if the witness fails to testify at trial, unless the witness is unavailable and the defendant has had a prior opportunity to cross examine the witness. Crawford, 541 U.S. at 59. On appeal, the State has the burden of establishing that statements are nontestimonial. State v. Koslowski, 166 Wn.2d 409, 417 n.3, 209 P.3d 479 (2009).

In this case, there is no record of the identity of the caller or any showing that he or she was unavailable for trial or subject to prior cross-examination. Rather, the caller was reporting a conversation with a jail employee who stated "they had heard a conversation where they were referring to Mr. Driscoll several times was participating in drug activity." Not only was the statement made "under circumstances which would lead

an objective witness reasonably to believe that the statement would be available for use at a later trial," Crawford, 541 U.S. at 52, but was provided for the sole purpose of providing evidence of the truth of the matter, namely that Driscoll was involved in drug activity. Under these circumstances, Driscoll was entitled to "be confronted with" the persons giving this testimony at trial. Id. at 54.

All confidence in the outcome of this case was undermined by counsel's inexplicable failure to object to this testimony, which was inherently prejudicial, allowing the jury to improperly base its consideration of the guilt of Driscoll based on his propensity to be involved in drug activity.

06. THE TRIAL COURT VIOLATED DRISCOLL'S AND THE PUBLIC'S CONSTITUTIONAL RIGHT TO AN OPEN AND PUBLIC TRIAL WHEN IT CONDUCTED AN IN-CHAMBERS CONFERENCE TO DISCUSS EVIDENCE ADMITTED AT TRIAL AND JURY INSTRUCTIONS.

Following closing argument, the trial court judge addressed the parties about meeting in chambers to discuss evidence admitted at trial and jury instructions:

> I would like to talk to counsel for a few minutes in chambers about the jury instructions. I think that the issue of the judgment and sentence has been resolved because I believe there's been a discussion about areas I was concerned about on that document. I'd like to see that

> though. And I'll talk with counsel about it as we look at jury instructions. No longer needs an instruction about the defendant choosing not to testify so the issue would be what we tell the jury about considering prior convictions. There would be two purposes: One purpose would be for impeachment. That's the standard instruction. The other purpose would be as a prerequisite element of a charged offense, and that is the prior conviction for delivery to a person under the age of 18. So are both counsel available now to talk with me?

[RP 212-13].

After answering an unrelated inquiry, the judge said, "Okay. We'll be in recess and I'll see counsel in chambers." [RP 215]. The record indicates that Driscoll was neither invited nor attended the conference, and there was no further discussion of the instructions on the record. [RP 215-16].

Both the Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee criminal defendants the right to a public trial. State v. Russell, 141 Wn. App. 733, 737-38, 172 P.3d 361 (2007), reviewed denied, 164 Wn.2d 1020 (2008); Presley v. Georgia, ___ U.S. ___, 130 S. Ct. 721, 723, 175 L. Ed. 2d 675 (2010) As well, article I, section 10 of the Washington Constitution states, "Justice in all cases shall be administered openly," thereby giving the public, in addition to the defendant, a right to open proceedings. Seattle Times Co. v. Ishikawa, Wn.2d 30, 36, 640 P.2d 716 (1982).

A defendant's right to a public trial "serves to ensure a fair trial, to remind the officers of the court of the importance of their functions, to encourage witnesses to come forward, and to discourage perjury." State v. Brightman, 155 Wn.2d 506, 514, 122 P.3d 150 (2005). Comparably, the public's right to an open trial, especially in the context of a criminal proceeding, safeguards that the accused "is fairly dealt with and not unjustly condemned...." State v. Momah, 167 Wn.2d 140, 148, 217 P.3d 321 (2009), cert. denied, 131 S. Ct. 160 (2010). A defendant's right and the public's right "serve complementary and independent functions in assuring the fairness of our judicial system. In particular, the public trial right operates as an essential cog in the constitutional design of fair trial safeguards." State v. Bone-Club, 128 Wn.2d 254, 259, 906 P.2d 325 (1995). And a defendant has standing to voice the public's interest in public trials. State v. Erickson, 146 Wn. App. 146 Wn. App. 200, 205 n.2, 189 P.3d 245 (2008); State v. Duckett, 141 Wn. App. 797, 804-05, 173 P.3d 948 (2007).

To protect these rights, a trial court may properly close a portion of a trial only after (1) properly conducting a balancing process of five factors and (2) entering specific findings on the record to justify so ruling. State v. Bone-Club, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995). A trial court's failure to conduct the required Bone-Club inquiry "results in a

violation of the defendant's public trial rights." State v. Brightman, 155 Wn.2d at 515-16. In such a case, the defendant need show no prejudice; it is presumed. Bone-Club, 128 Wn.2d at 261-62. Additionally, a defendant's failure to "lodge a contemporaneous objection" at the time of the exclusion does not amount to a waiver of his or her right to a public trial. Brightman, 155 Wn.2d at 514-15, 517. The remedy for such a violation is to reverse and remand for a new trial. In re Pers. Restraint of Orange, 152 Wn.2d 795, 814, 100 P.3d 291 (2004). This court reviews de novo the question of law of whether a defendant's right to a public trial has been violated. Brightman, 155 Wn.2d at 514.

In agreeing with our Supreme Court, this court recently held that there is no rule in itself "that the issues raised during in-chamber conferences are not subject to public scrutiny and the defendant's right to be present." State v. Bennett, ___ P.3d ___, 2012, WL 1605735, at *3.

The issue presented is whether the in-chambers discussion between counsel and the trial court concerning evidence admitted at trial and jury instructions violated Driscoll's and the public's right to an open and public trial under the state federal constitutions. In Bennett, this court declined to resolve this issue, reasoning that "a complete absence of a record relating to the challenged action cannot compel appellate review." Id. at *4 n.9.

> We need not resolve whether Bennett or the public had a right to observe a purely legal discussion relevant to Bennett's trial because our record fails to reveal that any issues, factual or legal, arose or were discussed." Id. at *3.

In contrast the record here reflects that the in-chambers conference did involve a discussion of legal or factual issues. The conference was initiated by the court when it explicitly requested to talk with counsel in chambers about the court's concerns regarding the content of the judgment and sentence entered at trial relating to Driscoll's prior convictions (State Exhibit 11), in addition to mentioning and offering a possible solution to "what we tell the jury about considering prior convictions." [RP 212]. The result of this process was Court's Instruction 6, which, as previously illustrated, instructed the jury that it could consider evidence of Driscoll's prior record in deciding what weight or credibility to give to Driscoll's testimony, "or for determining if a prerequisite element of a charged crime has been proved, and for no other reason." [CP 23-24; Court's Instruction 6]. This instruction was based on the State's Proposed Instruction 6 and added the above quoted phrase. [CP 59; (State's) Proposed Instruction 6]. This was obviously discussed during the in-chambers conference, and would have had to have been based on a discussion of the testimony at trial in addition to an interpretation of the as applicable to the facts and evidence in the case. Thus it cannot be said that the record fails to reveal

that any issues, factual or legal, did not arise or were not discussed during the in-chambers conference.

Given that the in-chambers conference went beyond mere administrative or ministerial functions, and given that the trial court failed to engage in a meaningful and required five-part Bone-Club analysis or set forth on the record specific findings to justify so ruling, and given that Driscoll's failure to object to the process does not constitute a waiver, and given that prejudice is presumed, this court must reverse Driscoll's convictions and remand for a new trial. State v. Brightman, 155 Wn.2d 514-15.

07. THE TRIAL COURT ERRED IN FINDING THAT DRISCOLL HAD THE CURRENT OR FUTURE ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS.

At sentencing, the trial court imposed $2,000.00 in legal financial obligations (LFOs). [CP 43-44]. Although there was no discussion of Driscoll's financial resources, the judgment and sentence included the following written finding on the preprinted form:

> The court has considered the total amount owing, the defendant's past, present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The court finds that the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein.

[CP 42].

When entering a finding regarding a defendant's ability to pay LFOs, a sentencing court must first consider the defendant's financial circumstances and the burden of imposing the obligations. State v. Bertrand, 165 Wn. App. 393, 403-04, 267 P.3d 511 (2011) (citing State v. Baldwin, 63 Wn. App. 303, 312, 818 P.2d 1116, 837 P.2d 646 (1991)).

A trial court's decision vis-à-vis a defendant's ability to pay LFOs is reviewed under the "clearly erroneous" standard. Bertrand, 165 Wn. App. at 403-04 (citing Baldwin, 63 Wn. App. at 312). At minimum, the record must establish the sentencing court at least considered the defendant's financial circumstances and the burden imposed by ordering payment. Bertrand, 165 Wn. App. at 404 (citing Baldwin, 63 Wn. App. at 311-12). A trial court's failure to exercise discretion in sentencing is reversible error. State v. Grayson, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005).

Such error may be raised for the first time on appeal. See Bertrand, 165 Wn. App. at 395, 405 (explicitly noting issue was not raised at sentencing hearing, but nonetheless striking sentencing court's unsupported finding); See also State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999) (unlawful sentence may be raised for first time on appeal).

As in Bertrand, this record reveals no evidence or analysis supporting the sentencing court's finding that Driscoll had the current or future ability to pay his LFOs. And given Driscoll's extensive record, length of exceptional sentence (102 months) and indigent stratus, the record suggests the opposite is true. [CP 41, 44, 77-79].

The sentencing court's finding that Driscoll had the current or future ability to pay his LFOs was clearly erroneous and must be stricken. Moreover, before the State can collect LFOs from Driscoll, "there must be a determination that (he) has the ability to pay these LFOs, taking into account (his) resources and the nature of the financial burden on (him)." Bertrand, 165 Wn. App. at 405 n.16.

08. THE CUMULATIVE EFFECT OF THE ERRORS CLAIMED HEREIN MATERIALLY AFFECTED THE OUTCOME OF DRISCOLL'S TRIAL AND REQUIRES REVERSAL OF HIS CONVICTIONS.

An accumulation of non-reversible errors may deny a defendant a fair trial. State v. Perrett, 86 Wn. App. 312, 322, 936 P.2d 426 (1997). The cumulative error doctrine applies where there have been several trial errors, individually not justifying reversal, that, when combined, deny a defendant a fair trial. State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000).

Here, for the reasons argued in the preceding sections of this brief, even if any one of the issues presented standing alone does not warrant reversal of Driscoll's convictions, the cumulative effect of these errors materially affected the outcome of his trial and his conviction should be reversed, even if each error examined on its own would otherwise be considered harmless. State v. Coe, 101 Wn.2d at 789; State v. Badda, 63 Wn.2d 176, 183, 385 P.2d 859 (1963).

E. CONCLUSION

Based on the above, Driscoll respectfully requests this court to reverse and dismiss his convictions and/or to remand with an order that the trial court strike the unsupported finding that Driscoll has the current or future ability to pay legal or financial obligations.

DATED this 21st day of May 2012.

Thomas E. Doyle

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CERTIFICATE

I certify that I served a copy of the above brief on this date as follows:

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DATED this 21st day of May 2012.

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